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OFFICE OF PETITIONS

In re Application of :
Mark S. Shaskey Sr. :
Application No. 10/671,974 : DECISION ON PETITION
Filed: September 26, 2003 : UNDER 37 C.F.R. § 1.137(A)
Attorney Docket No.: SHASKEY- :
PA-1 :
Title: APPARATUS TO FACILITATE :
THE HOLDING OF LARGE BOTTLES :
WITHOUT INTEGRAL HANDLES :

This is a decision on the petition submitted on May 9, 2007 pursuant to 37 C.F.R. § 1.137(a)¹.

BACKGROUND

The above-identified application became abandoned for failure to submit an Appeal Brief within two-months of the filing of a

¹ A grantable petition pursuant to 37 C.F.R. §1.137(a) must be accompanied by:

- (1) The reply required to the outstanding Office action or notice, unless previously filed;
- (2) The petition fee as set forth in 37 C.F.R. §1.17(1);
- (3) A showing to the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition was unavoidable;
- (4) Any terminal disclaimer (and fee as set forth in 37 C.F.R. §1.20(d)) required pursuant to paragraph (d) of this section.

Notice of Appeal, filed on November 4, 2005. No extensions of time pursuant to 37 C.F.R. §1.136(a) were received. Accordingly, the above-identified application became abandoned on January 5, 2006. A Notice of Abandonment was mailed on July 13, 2006.

Petitioner has alleged that the applicant failed to receive correspondence from his attorney.

Petitioner has further asserted that an appeal brief was enclosed with this petition. The electronic file has been reviewed, and **an appeal brief has not been located**. As such, **it appears that Petitioner's assertion is inaccurate**.

THE RELEVANT STANDARD

The word 'unavoidable' ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business².

In addition, decisions are made on a "case-by-case basis, taking all the facts and circumstances into account."³ Nonetheless, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable."⁴

ANALYSIS

Petitioner has met requirements (1) and (2) of Rule § 1.137(a). The fourth requirement is not applicable.

Regarding the first requirement of Rule § 1.137(a), a Request for Continued Examination (RCE) has been included with this petition, along with an amendment. The associated fee has been charged to Petitioner's Deposit Account, along with the petition fee.

² In re Mattullath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 U.S.P.Q. 666, 167-68 (D.D.C. 1963), aff'd, 143 U.S.P.Q. 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913).

³ Smith v. Mossinghoff, 671 F.2d at 538, 213 U.S.P.Q. at 982.

⁴ Haines v. Quigg, 5 USPQ2d 1130 (N.D. Ind. 1987), 673 F. Supp. at 316-17, 5 U.S.P.Q.2d at 1131-32.

The **failure to meet the third requirement of Rule § 1.137(a)** will be discussed below.

Petitioner has submitted a statement of facts from the inventor, who has set forth:

My failure to authorize my patent attorney to file an appeal brief resulted entirely from not receiving said attorney's mail at my residence, and hence a breakdown of communications with my patent attorney (sic).

...

A school bus stop is located in front of the mailbox at my residence. On many different occasions, I have personally seen children loiter at the bus stop, take mail out of my mail box (sic), and tear open my mail. I have repeatedly asked the children to cease tampering with my mail but my requests have gone unanswered. I still do not receive my bills or other mail regularly.

...

Since I did not receive my patent attorney's letter dated 30 November 2005 regarding the need to file an Appeal Brief, nor the Notice of Abandonment (a copy of which was mailed 20 July 2006) (sic).

...

In December 2006, I called my patent attorney and was informed of the abandonment. Immediately upon realization of the situation I authorized my attorney to prepare and file a Petition to Revive under 37 C.F.R. 1.137(a) (unavoidable delay) along with all supporting documents and fees.

The inventor has thus asserted that his attorney sent him a letter regarding the need to file an Appeal Brief, but this letter was not received. Consequently, the inventor never provided his attorney with the authorization to file an Appeal Brief. The inventor has suggested that the mailing was removed from his mailbox by neighborhood schoolchildren while waiting for the school bus.

Petitioner's arguments have been considered, and they have not been deemed to be persuasive.

First, the inventor has blamed the entire period of delay on the failure to receive a copy of a letter from his attorney, however it does not appear that a copy of this letter has been included with this petition.

Secondly, the inventor has suggested that his authorization was required before the attorney could file an appeal brief on his behalf. It does not appear that any documentation has been provided which would establish that the inventor's authorization was required before his counsel could file a paper on his behalf.

Third, it appears that Petitioner is attempting to meet the requirements of Delgar v. Schulyer, as delineated in MPEP § 711.03(c)(I)(A). However, the Delgar requirements are not relevant to the pertinent case, in that the communication in question was mailed to the inventor not by the Office, but rather by his attorney. In Delgar, the Office mailed a notice of allowance to the applicant, and the Delgar showing provides a mechanism by which applicants can establish that a mailing was not received from the Office. Petitioner is attempting to establish that a mailing was not received from counsel, a situation that is outside of the scope of Delgar.

Fourth, it does not appear that the inventor acted as a reasonably prudent and careful man, in relation to his most important business. Petitioner retained an attorney to file a patent application on his behalf. As such, he either knew or should have known to expect written correspondence from this attorney. Meanwhile, the inventor had actual knowledge of the fact that children tended to tamper with his mail, to such the degree that he does not regularly receive his mail.

A similarly situated reasonably prudent and careful man, acting in relation to his most important business, who was aware that children were removing his mail from his mail box and opening the same, would take affirmative steps to prevent this situation from occurring in the future. However, it does not appear that the inventor saw fit to rectify this situation via:

1. Obtaining a locking mailbox, or;
2. obtaining a Post Office box, or;
3. promptly retrieving his mail subsequent to the deposit of said mail by the mail delivery person but prior to the arrival of the children⁵, or;
4. contacting the local Postmaster about this situation, or;
5. contacting the local school board, or;
6. contacting the parents of these children.

⁵ It is noted that the inventor has set forth that he has personally seen the children remove mail from his mail box "on many different occasions," so it is clear that he is often present at the time of the trespass.

Fifth, the language of Rule § 1.137(a) makes it clear that it is the entire period of delay which must be shown to have been unavoidable. Assuming *arguendo* that Petitioner could establish that the inventor was powerless to prevent the continued theft of his mail, there remains two periods of delay that have not been addressed by the present petition.

There are three periods to be considered during the evaluation of a petition under Rule § 1.137(a):

- (1) the delay in reply that originally resulted in the abandonment;
- (2) the delay in filing an initial petition pursuant to Rule § 1.137(a) to revive the application; and
- (3) the delay in filing a grantable petition pursuant to Rule § 1.137(a) to revive the application.

Presuming that it was reasonable for the inventor to continue to allow the ongoing theft of his mail, the second and third periods of delay remain unaddressed.

Regarding the second period, it is noted that the inventor has asserted that in December of 2006, he called his attorney and was informed of the abandonment, and he "immediately" provided authorization for the attorney to file a petition pursuant to Rule § 1.137(a) on his behalf. However, another five months were allowed to pass before the filing of the present petition. Hence, it does not appear that Petitioner is in a position to establish that the entire period of delay was unavoidable.

Regarding the third period, it is noted that Petitioner is a registered practitioner. As a registered member of the patent bar, petitioner is expected to know the relevant laws, regulations, and fees pertaining to his practice and under which this Office operates, and he is charged with the responsibility of keeping himself up to date with any changes in these matters. Yet the second period of delay set forth above was not addressed in this petition.

Consequently, the petition pursuant to 37 C.F.R. § 1.137(a) must be **DISMISSED**.

CONCLUSION

Any reply must be submitted within **TWO MONTHS** from the mail date of this decision. Extensions of time under 37 C.F.R. §1.136(a) are permitted. The reply should include a cover letter entitled "Renewed Petition Pursuant to 37 C.F.R. 1.137(a) and/or

1.181(a)". This is not a final agency action within the meaning of 5 U.S.C 704.

Alternatively, Petitioner may also submit a petition pursuant to 37 C.F.R. § 1.137(b).

Any subsequent filing pertaining to the abandonment of this application should indicate in a prominent manner that the attorney handling this matter is Paul Shanoski, and may be submitted by mail⁶, hand-delivery⁷, or facsimile⁸.

If responding by mail, Petitioner is advised not to place the undersigned's name on the envelope. Only the information that appears in the footnote should be included - adding anything else to the address will delay the delivery of the response to the undersigned.

It is noted that the address listed on the petition differs from the address of record. The application file does not indicate a change of correspondence address has been filed in this case, although the address given on the petition differs from the address of record. If Petitioner desires to receive future correspondence regarding this application, the change of correspondence address must be submitted.

A courtesy copy of this decision will be mailed to Petitioner. However, all future correspondence will be directed to the address of record until such time as appropriate instructions are received to the contrary. Petitioner will not receive future correspondence related to this application unless Change of Correspondence Address, Patent Form (PTO/SB/122) is submitted for the above-identified application.

For Petitioner's convenience, a blank Change of Correspondence Address, Patent Form (PTO/SB/122), may be found at <http://www.uspto.gov/web/forms/sb0122.pdf>.

Telephone inquiries regarding this decision should be directed to the undersigned at (571) 272-3225⁹. All other inquiries

6 Mail Stop Petition, Commissioner for Patents, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA, 22313-1450.

7 Customer Window, Randolph Building, 401 Dulaney Street, Alexandria, VA, 22314.

8 (571) 273-8300- please note this is a central facsimile number.

9 Petitioner will note that all practice before the Office should be in writing, and the action of the Office will be based exclusively on the written record in the Office. See 37 C.F.R. §1.2. As such, Petitioner is

Decision on Petition under 37 C.F.R. §1.137(a)

concerning examination procedures or status of the application should be directed to the Technology Center.



Paul Shanowski
Senior Attorney
Office of Petitions
United States Patent and Trademark Office

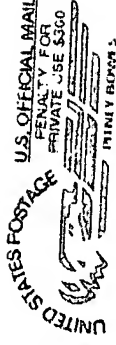
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reminded that no telephone discussion may be controlling or considered authority for any further action(s) of Petitioner.

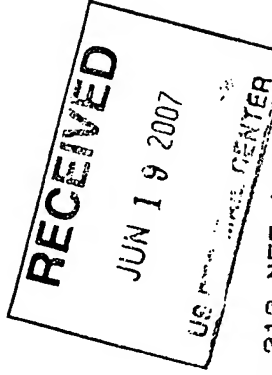
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